IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-443

KARIN S. QUAM, individually and as Prospective Executrix of the Estate of HOWARD QUAM, deceased,

Petitioner,

v.

MOBIL OIL CORPORATION,
PERTH AMBOY DRY DOCK CO.,
INTERSTATE INDUSTRIAL PROTECTION, INC.,

Respondents.

BRIEF OF RESPONDENT MOBIL OIL CORPORATION IN OPPOSITION

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Statement

The respondent, Mobil Oil Corporation, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 599 F. 2d 42.

Statement of the Case

The only direct testimony supported by documentary evidence introduced at trial was from petitioner, Karin S. Quam.

The testimony and evidence at trial indicated that a personal, collect telephone call from decedent Howard Quam, first assistant engineer of SS "MOBIL CHICAGO" was received by petitioner from a telephone booth on Perth Amboy's dock some 100 feet from the vessel at 5:51 on May 3, 1976. In addition, a second telephone call was made by decedent, at approximately 7:30 P.M. In this second telephone call decedent advised petitioner that he was calling from the dock and was returning to the vessel to watch television.

There was a clear, unobstructed walking area from the phone booth to the vessel. Specifically, as one proceeded from the telephone booth there was a solid pier leading to a properly secured gangway with proper railings leading to a barge, then a clear path across the barge to the vessel's gangway, which was also properly secured and had proper railings.

Petitioner, Karin S. Quam, further testified that decedent had a peculiar habit of never leaving his home or living quarters, even for a few minutes, without wearing or carrying his watch and wallet. Decedent's watch and wallet were found in his locker on board the vessel and returned to appellant with his personal effects.

The following day, May 4, 1979, decedent's body was found nearly a mile away, in New York waters, from the location where the vessel was moored at Perth Amboy Dry Dock Company in New Jersey waters.

Remote and isolated unsafe conditions may have existed in other areas of the Perth Amboy terminal. However, there was no probative evidence whatsoever that decedent was or had reason to be in any of these remote and isolated areas.

In fact, there was not any evidence introduced at trial, as pointed out in the District Court opinion, that decedent "• • • even made it as far as Perth Amboy's dockyard

at the pier." (Sweet, J.) (See District Court opinion annexed to Petition, Appendix B, at p. 11a).

Reasons for Denying the Writ

None of the considerations governing review on certiorari set forth in Supreme Court Rule 19(b) are involved in this case.

Petitioner's Petition is without merit because the decision of the Court below involved a question of law based upon a failure of proof and the cases relied upon by petitioner herein are clearly distinguishable on their facts.

Five points are raised by petitioner in the petition for a writ. Each is answered separately herein to the extent that it involves respondent, Mobil Oil Corporation.

Response to Petitioner's Point No. I

The question presented by petitioner herein has in fact been fully answered in the very case petitioner relies upon in seeking a writ of certiorari, *Schulz* v. *Pennsylvania R. Co.*, 350 U.S. 523 (1956), wherein this Court made it clear that:

> "Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, *grounded on evidence consisting of direct statements by witnesses of proof of circumstances from which inferences can fairly be drawn.*" 350 U.S. 523 526 (emphasis supplied)

For this reason, *Schulz* v. *Pennsylvania R. Co., supra,* is even stronger authority for denying certiorari herein because in *Schulz, this Court "• • • made it abundantly clear that there must be proved facts to support the conclusion reached." Pennsylvania Railroad Company* v. *Pomeroy,* 239 F. 2d 435 at 442 (D.C. Cir. 1956) cert. den. 353 U.S. 950 (1957) (emphasis supplied).

In *Schulz,* because this Court found such underlying facts existing, their having been established at trial below, it held that the case should have been submitted to the jury, because,

> "(f)air-minded men could certainly find from the * * * facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties." 350 U.S. 523 at 526.

There was also direct evidence in *Schulz* that "(h)is (decedent's) street clothes were hanging in the upper engine room where the tug attendants usually change clothes.", 350 U.S. 523 at 524, and that his body was found in the water near the vessel.

In conclusion, by reason of all the underlying facts and evidence introduced at trial in *Schulz,* a jury could reasonably infer that on the very cold evening in question decedent Schulz could only have gone a few feet, in his underwear, in an area concededly covered with ice, when he was caused to fall to his death by reason of the negligence of the defendant or the unseaworthiness of its vessels.

Whereas in the present case it is abundantly clear, as was found by the District Court and affirmed by the Court of Appeals, *per curiam,* there was no such probative evidence introduced at trial from which a jury could reasonably draw an inference or conclusion that respondent Mobil Oil Corporation was negligent or that its vessel the SS "MOBIL CHICAGO" was unseaworthy. By permitting this case to have gone to the jury, as stated by Judge Sweet, a jury verdict in favor of plaintiff would necessarily have been the result of "* * * speculation and not inference from any probative evidence" (See District Court Opinion, annexed to Petition, at p. 13a).

Response to Petitioner's Point No. I (a)

The only direct evidence which placed decedent on the dock was the testimony that he made two personal telephone calls to petitioner, on the day previous to his demise.

His presence on the dock for purely private and personal business and in no way within the scope of his employment or in service of the vessel is far different from the situations existing in *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* 318 U.S. 36 (1943), and *Braen* v. *Pfeifer Oil Transportation Co.,* 361 U.S. 129 (1959). In *O'Donnell,* the seaman-plaintiff was ordered to go ashore by the master of the vessel to perform repair work necessary for the discharge of cargo from the vessel when the seaman was injured. Similarly, in *Braen,* the seaman-plaintiff was ordered by his supervisor to leave the vessel on which he was employed and to perform work on a nearby raft, used in servicing his employer's vessels, when he was injured.

Rather the case at bar is similar to the facts existing in *Wheeler* v. *West India S.S. Co.,* 103 F. Supp. 631, affd. 205 F. 2d 354, cert. den. 346 U.S. 889 (1953), which was cited by the District Court (Sweet, J.) in the opinion below (See Appendix B, annexed to Petition, at p. 12a).

In *Wheeler,* unsafe conditions may have existed beyond the vessel's gangway, but the trial Court nevertheless found a failure of proof, writing that:

> "* * * shipowners have generally been held not liable for unsafe conditions in places beyond the gangway not under their control when the seaman is there for his own purposes and not in the performance of his duties. Todahl v. Sudden & Christenson, supra; [5 F. 2d 462]; Walton v. Continental S.S. Co., supra [66 F. Supp. 836]; Lilly v. United States Lines Co., D.C.S.D.N.Y. 1941, 42 F. Supp. 214; see Toyo Kisen Kaisha v. Hartman 9 cir. 1918, 253 F. 422, 424." 103 F. Supp. 631, 634.

But for an even more dispositive reason petitioner s reliance upon *O'Donnell,* and *Aguilar* v. *Standard Oil Co.,* 318 U.S. 724 (1943), is misplaced. Both *O'Donnell* and *Aguilar* involved claims for maintenance and cure, which is an obligation *imposed without fault,* and clearly ". . . in no sense a function of his (vessel owner's) negligence or fault." *Aguilar,* 318 U.S. 724 at 736.

Because a vessel owner's liability to provide maintenance and cure to an injured crew member is absolute, this Court has extended such obligation to injuries occurring on shore beyond the vessel's gangway. Clearly the principles set forth in *O'Donnell* and *Aguilar* have no application whatever to the case at bar, where the question of law decided by the Court below concerned the burden of proof required to establish fault.

This was recognized by the Court in *Wheeler,* supra where it wrote that:

> "The suggestion that the Supreme Court's decisions in the *O'Donnell* and *Aguilar* cases indicate an extension of the shipowner's liability so as to include such situations was clearly rejected in *Lemon* v. *United States* D.C., 68 F. Supp. 793, 1946 A.M.C. 1640. The Court accordingly is forced to conclude that, at least as yet, it can not be held that the shipowner's liability extends to such situations." 103 F. Supp. 631 at 634.

Response to Petitioner's Point No. II

As with *Schulz* the two other cases cited in the Court of Appeals' decision, namely *Rogers* v. *Missouri Pacific Railroad Co.,* 352 U.S. 500 (1957), and *Ferguson* v. *Moore-McCormack Lines, Inc.,* 352 U.S. 521 (1957), which appellant claims have either been misconstrued, misconceived or not understood by the Circuit Court, were not only considered but also clearly distinguished by the Second Circuit by reason of their respective facts and proofs.

The case at bar is not one where, as in *Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500 (1957) reh. den. 353 U.S. 943 (1957), there was substantial underlying proof introduced at trial which "* * * *supplied ample support for a jury finding that respondent's negligence played a part in the petitioner's injury*", which proof consisted of "* * * probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did." 350 U.S. 500 at 503 (emphasis supplied).

Nor is this a case where, as in *Ferguson* v. *Moore-McCormack Lines,* 352 U.S. 521 (1956) "* * * there was sufficient evidence to take to the jury the question whether respondent was negligent in failing to furnish petitioner with an adequate tool with which to perform his task."

Nor is this case similar to *Admiral Towing Company* v. *Woolen,* 290 F. 2d 641 (9th cir. 1961), where the issue was whether or not the undermanning of the tug boat "COMPANION" led to decedent's death and the Court of Appeals found that "* * * the trial Court * * * could well have concluded, as it actually did, that the Companion was inadequately manned", because the underlying proof and "* * * evidence showed that the Companion was a two-man vessel and that Woolen (decedent) was a seventeen year old high school student with no experience upon the open sea." 290 F. 2d 641 at 646.

Rather, in the case at bar, as stated by the Second Circuit, "*There was simply no evidence of causation.*" See Second Circuit opinion annexed to Petition, Appendix A, p. 4a (emphasis supplied).

Nowhere has a case or other authority or precedent been cited by petitioner to indicate that this Court has cast doubt upon the basic underlying principle of law that a plaintiff or his representative still has the burden of introducing

sufficient evidence on the issue of causation to warrant having his case submitted to a jury. See *Pennsylvania Railroad Company* v. *Pomeroy,* 239 F. 2d 435, 443: *"We know of no authority which rejects that principle, or suggests that appellate courts should abdicate their responsibility to see that verdicts are based on adequate evidence."* (emphasis supplied.)

Response to Petitioner's Point No. III

The question presented herein and petitioner's assertion on page 5 of the within petition that *"Schulz* v. *Pennsylvania R. Co.,* has been followed by every Court of Appeals that has dealt with the question until the case at bar arose" is misleading. This statement by petitioner implies that the *Schulz* result must be absolute in all cases. This is simply not true.

In point of fact the Second Circuit Court of Appeals following the principles of *Schulz,* determined that petitioner had failed to sustain its burden of proof.

The Second Circuit, as well as other Courts of Appeals, have distinguished *Schulz* where there was also an underlying failure of proof and in each instance where *Schulz* was so distinguished certiorari was denied by this Court. See *Swords* v. *American Sealanes, Inc.,* 443 F. 2d 1324, 1325 (4th cir. 1971), cert. den. 404 U.S. 948 (1971); *Pennsylvania Railroad Company* v. *Pomeroy,* 239 F. 2d 435, 442-443 (Cir. D.C. 1956), cert. den. 353 U.S. 950 (1957); *Smith* v. *Reinauer Oil Transport,* 256 F. 2d 646, 651 (1st cir. 1958), cert. den. 358 U.S. 889 (1958); see also *Miller* v. *Farrell Lines,* 247 F. 2d 503, 507 (2d cir. 1957), cert. den. 355 U.S. 912 (1958) and *Berke* v. *Lehigh Marine Disposal Corp.,* 435 F. 2d 1073, 1075 (2d cir. 1970), cert. den. 404 U.S. 825 (1971).

Similarly, the trial Court and Circuit Court herein followed, but distinguished the *Schulz* case on its facts, quite properly and clearly, from the instant matter.

Response to Petitioner's Point No. IV

The question presented herein is merely repeating and restating in a three line statement the questions presented in the other points.

For this reason, it is respectfully requested that reference be made to the foregoing answers in response to this point.

CONCLUSION

It is submitted that in the circumstances herein the granting of a writ of certiorari is not warranted.

Respectfully submitted,

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